No. 91-825

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEBBIE HEAVRIN - - - - - **Petitioner**

v.

TONY JEFFERS - - - - - **Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In light of *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), does a Court of Appeals have discretion to deny a motion to dismiss an appeal pursuant to Fed. R. App. P. 3(c) where the appellant failed to designate the final and appealable judgment or order of the Trial Court?

2. In a 42 U.S.C. Section 1983 action, may a Court of Appeals, without regard to Fed. R. Civ. P. 52(a), reverse the trial court's finding of probable cause for an arrest and is it error for the Court of Appeals not to adjudicate the qualified immunity defense of the arresting officer since that issue was fully litigated in the Trial Court and argued on appeal?

PARTIES

The petitioner in this Court is Officer Debbie Heavrin of the Jefferson County Police Department, who was an appellee in the proceedings below. The respondent in this Court is Tony Jeffers, who was the appellant in the proceedings below. The other parties to the proceedings below were Churchill Downs, Inc.; the City of Louisville; and Jefferson County, Kentucky; all of which were appellees and prevailed in the United States Court of Appeals for the Sixth Circuit.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

1. *Jeffers* v. *Heavrin, et al.*, 932 F.2d 1160 (6th Cir. 1991).
2. *Jeffers* v. *Heavrin, et al.*, 701 F. Supp. 1316 (W.D. Ky. 1988).

JURISDICTION

The United States Court of Appeals issued its Opinion on May 13, 1991, [*Jeffers* v. *Heavrin, et al.*, 932 F.2d 1160 (6th Cir. 1991)], affirming in part and reversing in part the decision of the United States District Court and remanding the case with instructions for further proceedings consistent with the opinion.

On July 3, 1991, the Court of Appeals denied the appellees' petition for a rehearing, *Jeffers* v. *Heavrin, et al.*, Nos. 89-5944/6059, Order Denying Rehearing en Banc (6th Cir. 7/3/91).

On September 26, 1991, this Court granted an extension of time to and including November 15, 1991, to file this petition for a writ of certiorari.

The jurisdiction of this Court to review this Petition for Writ of Certiorari is invoked under Title 28, United States Code, Section 1254(1) and in conformity with Title 28, United States Code, Section 2101(c) and Supreme Court Rules 13 and 14.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

This case involves Amendment IV to the Constitution of the United States, which provides:

> **Unreasonable searches and seizures.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Also involved is 42 U.S.C. Section 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, of other proper proceeding for redress.

Portions of the Kentucky Revised Statutes (KRS) are pertinent including KRS 217.275(1), (2), (4) and (10); and KRS 218A.140(2) and (4).

> **217.175. Prohibited Acts**--The following acts and the causing thereof within the Commonwealth of Kentucky are hereby prohibited:
>
> (1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic this is adulterated or misbranded;

(2) The adulteration or misbranding of any food, drug, device, or cosmetic;

. . . . .

(4) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of KRS 217.075;

. . . . .

(10) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of KRS 217.005 to 217.215;

218A.140. Prohibited acts relating to controlled substances.

. . . . .

(2) No person shall possess any controlled substance except as authorized in this chapter.

. . . . .

(4) (a) No person shall obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance by fraud, deceit, misrepresentation, or subterfuge, or by the forgery or alteration of a prescription, or by the concealment of a material fact, or by the use of a false name or the giving of a false address.

(b) No person shall willfully make a false statement regarding any prescription, order, report, or record required by this chapter.

(c) No person shall, for the purpose of obtaining a controlled substance, falsely assume the title of or represent himself to be a manufacturer, wholesaler, distributor, repacker, pharmacist, practitioner, or other authorized person.

(d) No person shall make or utter any false or forged prescription.

(e) No person shall affix any false or forged label to a package or receptacle containing any controlled substance.

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The following Federal Rule of Appellate Procedure and Federal Rule of Civil Procedure are critical to this matter:

FED. R. APP. P. 3(c):

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Fed. R. Civ. P. 52(a), in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

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TONY JEFFERS - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

May It Please The Court:

This action was instituted by Tony Jeffers, Respondent herein, pursuant to Title 42, United States Code, Section 1983, seeking injunctive relief and damages as a result of his arrest by Officer Debbie Heavrin at the Kentucky Derby on May 7, 1983. Before setting forth the pertinent facts of Mr. Jeffers' arrest, it is necessary to provide the Court with salient information regarding the Kentucky Derby and its security needs.

The Kentucky Derby is held every year in Louisville, Kentucky, on the first Saturday in May at Churchill Downs, a thoroughbred race track owned by Churchill Downs, Inc., a private corporation. The Derby attracts approximately 130,000 patrons, of which 55,000 are seated in the track's grandstand and clubhouse, and some 75,000 are permitted —on this one day only—to occupy the infield area inside

the one-mile oval racetrack where no fixed seating is furnished.

Security for this event is provided by various agencies, including the Kentucky State Police, the Jefferson County Police Department, the City of Louisville Police Department, and on past occasions, the Federal Bureau of Investigation, the United States Secret Service and the National Guard.

The Jefferson County Police Department has charge of the infield area and since 1981, with the permission of Churchill Downs, Inc., assumed the responsibility, previously performed by private security guards, of inspecting all parcels brought through the admission gates in order to minimize and control injuries, fights and other abuses. Large signs are posted outside the gates which read:

> NOTICE: GRILLS, CHARCOAL, BOTTLES, WEAPONS AND ANY ITEM WHICH MAY BE USED AS A WEAPON OR A MISSILE, WHICH COULD BE USED TO INJURE THE GENERAL PUBLIC ARE EXPRESSLY FORBIDDEN IN AND ON CHURCHILL DOWNS PROPERTY. PATRONS MUST TAKE THEIR PARCELS BACK TO THEIR VEHICLES, DEPOSIT SUCH ITEMS IN A DUMPSTER OR SUBJECT ITEMS TO INSPECTION BY POLICE.

Two police officers are placed behind each entry turnstile at the gates to search parcels after patrons have paid their admission, and "pat down" individuals wearing bulky or unseasonal clothing. As the enormous volume of non-stop traffic passes through the turnstiles, each search usually requires only a brief stop of the person, and prohibited items, which the possessors do not wish to take

back outside the gates, are tossed into a dumpster. Patrons who do not want to submit to this inspection can elect to leave the premises with their possessions and receive a full refund of the admission price.

On the morning of May 7, 1983, Officer Debbie Heavrin, a member of the Jefferson County Police Department, was stationed behind the turnstile of a gate through which Tony Jeffers and his three friends brought a grocery bag containing various items of food and a previously opened Pringles potato chip can. Officer Heavrin searched the grocery bag and, feeling the Pringles can too heavy to contain merely potato chips, opened the lid. Emptying the can, she discovered a small amber plastic pill bottle. No label was attached to the outside of the bottle but there was an unattached prescription label visible inside the bottle with several pills. When Officer Heavrin inquired about the pill bottle, Jeffers replied that it contained his allergy medicine; however, Officer Heavrin "thought he was probably lying" because this was a "common answer" to police inquiries about pills.

Only having been a police officer for approximately one year and inexperienced in drug identification, Officer Heavrin asked Sergeant Robert Jones, her superior officer, to have a nearby narcotics officer examine the pills. According to Heavrin, Sergeant Jones returned in about a minute and, according to Officer Heavrin's uncontradicted testimony in this action, "He told me that the pills were Valium and I could charge Mr. Jeffers if I wanted to."[1]

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[1]This is the exact statement that appears in the Trial Transcript (Vol. 1, p. 66) and in the joint appendix (Vol. I, p. 123) filed with the Court of Appeals. App. 43a. Officer Heavrin was misquoted in this regard by the District Court, 701 F. Supp.

(Continued on next page.)

Officer Heavrin then arrested Jeffers and filled out an arrest slip which stated the charges as "Drugs in improper container." The bottle of pills was turned over to a narcotics officer for a laboratory analysis and Heavrin returned to her post at the gate. As testified to by Jeffers, it is undisputed that at all times Officer Heavrin was polite and professional.

The laboratory report showed no evidence of any illegal substance in the pill bottle and the criminal charges against Jeffers were dismissed. This action ensued.

The District Court tried this action without a jury and issued its "Findings of Fact and Conclusions of Law and Order" in favor of Heavrin and the other Defendants on October 18, 1988, which were entered of record on October 21, 1988. Because of an inconsistency with respect to the Trial Court's ruling on Jeffers' "negligent prosecution" claim, Officer Heavrin and Jefferson County made a motion to amend the findings. By an order entered on July 7, 1989, the District Court overruled the motion to amend, but provided for the deletion of one word from its Conclusions of Law.

Jeffers then filed a notice of appeal from this latter order overruling the motion to amend characterizing it as the "final judgment entered on July 1, 1989"; however, the notice of appeal did not specify nor reference in any manner the actual judgment on the merits on October 21, 1988 as required by FED. R. APP. P. 3(c). Officer Heavrin

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at 1320, which apparently confused Heavrin's testimony with that of Tony Jeffers, who testified Heavrin was told, "He thinks they are Valium, you can either charge him or you can throw them away." Tr., Vol. III, p. 121, App. 44a. In any event, there is no factual dispute officer Heavrin was advised the pills were suspected Valium and she could charge Jeffers.

and Jefferson County then properly cross-appealed on August 16, 1989, and subsequently filed a motion to dismiss the Jeffers appeal pursuant to FED. R. APP. P. 3(c) on the ground that his notice of appeal had designated only the order entered on July 7, 1989, and not the judgment dated October 18, 1988, and entered on October 21, 1988. On November 20, 1989, the Court of Appeals denied this motion to dismiss the appeal. A renewed motion to dismiss the appeal was denied on August 2, 1990.

On May 31, 1991, the Sixth Circuit Court of Appeals affirmed in part and reversed in part the decision of the District Court, holding that the arrest of Jeffers was without probable cause. The Sixth Circuit remanded this action to the District Court for further proceedings. Each of the three judges wrote a separate opinion, two of them both concurring and dissenting.

ARGUMENT

I. The Sixth Circuit's Denial of the Instant Petitioner's Motion to Dismiss Jeffers' Appeal for Failure to Designate the Proper Final Order of the Trial Court Is Contrary to Fed. R. App. P. 3(c) and This Court's Decision in *Torres* v. *Oakland Scavenger Company* 487 U.S. 312 (1988).

Jeffers' Notice of Appeal misdesignated the final judgment or order as the "final judgment entered on July 7, 1989" which was actually the order overruling a motion to amend, and was not the final order entered by the trial court on October 21, 1988.[2] It is beyond cavil Jeffers failed to comply with the simple requirement of that portion of

[2]The entire text of the Respondent's Notice of Appeal reads: "The Plaintiff, Tony Jeffers, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered on July 7, 1989." App. 41a.

FED. R. APP. P. 3(c) requiring an appellant to "designate the judgment, order or part thereof appealed from . . ." in a notice of appeal.[3] By order dated November 20, 1989, the Sixth Circuit denied the instant Petitioner's Motion to Dismiss Jeffers' appeal for failure to comply with FED. R. APP. P. 3(c) ruling the "misidentification of the ruling being appealed from does not destroy appellate jurisdiction as long as the Appellant's intent is apparent and the Appellee suffers no prejudice." App. 17a.

Petitioner asserts the Sixth Circuit's Order in this regard ignores this Honorable Court's decision in *Torres* v. *Oakland Scavenger Company,* 487 U.S. 312 (1988), holding ". . . although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds they have not been met. [Footnote omitted]". *Id.* at page 317. While *Torres* dealt with that portion of Rule 3(c) requiring designation of parties taking the appeal, the decision clearly does not intimate the other jurisdictional prerequisites of such rule are to be treated differently. Indeed, the *Torres* decision specifically addressed the Supreme Court's prior decision in *Foman* v. *Davis,* 371 U.S. 178 (1962), in which the Court examined the judgment designation requirement in a different factual context than the instant case and specifically noted "Foman did not address whether the requirement of Rule

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[3]FED. R. APP. P 3(c) states:

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

3(c) at issue in that case was jurisdictional in nature; rather, the court simply concluded that in light of all the circumstances, the rule had been complied with." *Torres, supra,* at p. 316. Further, the jurisdictional prerequisites of Rule 3(c) as being subject to a "harmless error" analysis was specifically rejected by this Court when it stated, in pertinent part:

> In addition to urging that the requirements of Rule 3(c) are not jurisdictional in nature, Petitioner advances two other arguments in support of his position, neither or which has merit. First, Petitioner argues that courts of appeals should apply "harmless error" analysis to defects in a notice of appeal. *This argument misunderstands the nature of a jurisdictional requirement: a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court.* (emphasis added) *Torres, supra,* at page 317, footnote 3.

The various courts of appeals, however, have restrictively interpreted *Torres* such that only the specification of parties requirement of Rule 3(c) has been uniformly applied as jurisdictional; e.g., *Cotton* v. *U.S. Pipe & Foundry Co.*, 856 F.2d 158 (11th Cir. 1988); *Santos-Marinez* v. *Soto-Santiago,* 863 F.2d 174 (1st Cir. 1988). With respect to the judgment designation requirement of Rule 3(c), the appellate courts have not been consistent in their treatment of this jurisdictional prerequisite and have created an untenable anomaly in accepting jurisdiction in some misdesignation situation but not in others.

In *Turnbull* v. *United States,* 929 F.2d 173 (5th Cir. 1991), the appellant misdesignated his appeal as one from an order denying a motion for a new trial instead of the actual final judgment. The Fifth Circuit interpreted

Torres as making a distinction between the judgment designation provision of Rule 3(c) and the parties specification provision and concluded that "[f]ailure to properly designate the order appealed from is not a jurisdictional defect, and may be cured by an indication of intent in the briefs or otherwise." *Turnbull, supra,* at p. 177. This paradoxical approach to the rule is also followed in certain other circuits: *Krause* v. *Bennett,* 887 F.2d 263 (2nd Cir. 1989); *Washington State Health Facilities* v. *DSHS,* 879 F.2d 677 (9th Cir. 1989).[4]

As further evidence of the anomalous treatment the appellate courts have given Rule 3(c), some decisions apply the *Torres* rationale only where a part of a judgment is appealed, or to collateral orders or judgments that are not within the procedural progression of a subsequent order or judgment from which a timely appeal is taken; *United States* v. *Rivera Const. Co.,* 863 F.2d 293 (3rd Cir. 1988); *Pope* v. *MCI Telecommunications Corp.,* 937 F.2d 258 (5th Cir. 1991); *Durango Associates, Inc.* v. *Reflange, Inc.,* 912 F.2d 1423 (D.C. Cir. 1990). Further, the First Circuit has struggled inconclusively with the application of *Torres* to the judgment designation provision of Rule 3(c); *Kotler* v. *American Tobacco Company,* 926 F. 2d 1217 (1st Cir. 1990); while the Seventh Circuit has applied the *Torres* rule in an appeal from part of a final order; *Brandt* v. *Schal Associates, Inc.,* 854 F.2d 948 (7th Cir. 1988).

The incongruity of these decisions with respect to the mandate of *Torres* is manifest. If an appellant misdesignates his appeal from an order denying a new trial, as

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[4]Unlike these cases, it should be noted the instant petitioner filed a motion to dismiss the appeal of the plaintiff on September 29, 1989, prior to any briefs being filed on the merits.

was the situation in *Turnbull, supra,* the courts have liberally construed this as compliance with Rule 3(c) and the appellant is free to make whatever arguments he deems necessary with respect to the entire case. If, on the other hand, an appellant should correctly identify the final judgment but be *too specific* with respect to the identity of the judgment and the issues contained therein, the appellant will be precluded from raising any other issue on appeal except those specified in his notice of appeal. Such was the case in *Pope* v. *MCI Telecommunications Corp., supra,* where the appellant generally identified the district court's final order and highlighted the major issues resolved therein but failed to make any mention either of the award of costs or attorneys fees and so was precluded by the Fifth Circuit from arguing those issues. As a result, the appellate courts reward sloppy and inartful designation of judgments or orders which are not even final by assuming jurisdiction of appeals patently contrary to Rule 3(c) yet, they punish the patently effective judgment designations if they are painted with too fine a brush.

Simply stated, Petitioner urges this Honorable Court to grant certiorari to rectify the conundrum created by the various appellate courts, including the Sixth Circuit in the instant case, which have ignored the simple mandate of *Torres* that Rule 3(c) delineates strict prerequisites to jurisdiction of an appellate court. Even assuming, arguendo, that *Torres* is somehow limited to only the subpart of Rule 3(c) addressing party designation as a jurisdictional prerequisite, it is equally critical, in that circumstance, for the Supreme Court to settle the important question of whether the judgment designation and court designation requirements are also mandatory prerequisites to

appellate jurisdiction without regard to either a "harmless error" or "substantial compliance" standard.

Neither the language of Rule 3(c) or simple logic justifies a dichotomy of standards for the various requirements of Rule 3(c). The rule is simple and straightforward on its face. An appellant must specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and name the court to which the appeal is taken. All of the language of the rule is couched in mandatory terms and it certainly cannot be seriously argued that the terms "specify" and "designate" are anything other than synonymous. It is no more difficult or onerous to designate the proper judgment than it is to specify each party or, for that matter, to designate the correct court to which the appeal is taken. If one aspect of the rule is an absolute jurisdictional requirement, then there is no basis in logic or the law why the other two requirements should not be similarly treated. Petitioner's reading of *Torres* certainly supports this simple rationale but it is apparent the various courts of appeals are not similarly persuaded and this Honorable Court should resolve the issue by granting certiorari in the instant matter.

II. The Sixth Circuit's Holding the Petitioner Lacked Probable Cause to Arrest Respondent Is Not In Conformity with Fed. R. Civ. P. 52(a) or with Applicable Decisions if This Court and Other Courts of Appeals Especially in the Context of 42 U.S.C. Section 1983 Actions and the Doctrine of Qualified Immunity.

The decision of the Sixth Circuit that Officer Heavrin lacked probable cause to arrest Jeffers does not rest upon a finding the Trial Court's determination in this regard was clearly erroneous but upon only one cited authority, *Illinois* v. *Gates,* 462 U.S. 213 (1983), a case involving sup-

pression of evidence obtained pursuant to a defective search warrant. Basically the *Gates* decision set forth a "totality of circumstances" standard for determining probable cause for the issuance of a search warrant. It is manifest from its opinion the Sixth Circuit gave no deference whatsoever to the fact findings of the Trial Court or the Trial Court's legal basis for determining probable cause existed for the arrest of the Respondent. Thus, the Sixth Circuit's decision in this regard does not conform to FED. R. CIV. P. 52(a) setting forth the "clearly erroneous" standard for appellate review.[5] The failure of the Sixth Circuit to adhere to the requirements of Rule 52(a) is contrary to a clear body of authority by this court, the Sixth Circuit itself and other Courts of Appeals. Finally, even absent the Rule 52(a) consideration, the Sixth Circuit's lack of probable cause determination is inconsistent with authority of this Court and other courts of appeals on the issue especially as it relates to claims made pursuant to 42 U.S.C. Section 1983 and the doctrine of qualified immunity.

In the first instance, *Illinois* v. *Gates, supra,* addresses probable cause in the context of suppression of evidence obtained pursuant to a faulty search warrant. Even so, *Gates* recognizes that probable cause is to be considered within the factual context of the case and ". . . proba-

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[5]Rule 52(a) states in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

bility and not a prima facie showing of criminal activity is the standard . . .", *Gates, supra* at p. 235. When considering probable cause for an arrest, the more appropriate standard established by this court is set forth in *Draper* v. *United States,* 358 U.S. 307 (1959), cited by the Trial Court. In that case, this Honorable Court articulated standards for the kind of information officers may rely upon to meet the probable cause standard for a warrantless arrest under the Fourth Amendment and held explicitly:

> In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men not legal technicians act [citation omitted]. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. [citation omitted] *Draper supra,* at p. 313.

In particular there is no requirement that the officers' belief be ". . . correct or more likely true than false . . ." and all that is required is the ". . . probability that incriminating evidence is involved . . ."; *Texas* v. *Brown,* 460 U.S. 730, 742 (1983).

Applying *Draper* to the instant matter, the Trial Court made specific findings of fact on the existence of probable cause.[6] While the Petitioner would argue probable cause

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[6]The Trial Court determined Officer Heavrin had probable cause to arrest Jeffers for violations of KRS 217.175(1), (2), (4), (10); 218A.140(2), (4) all of which are set forth at pp. ix and x of this Petition. App. 35a-36a. The factual basis upon which the trial

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for Jeffers' arrest is apparent even under the application of *Gates, supra,* it is clear the Sixth Circuit disregarded the Trial Court's findings of fact and should have considered Jeffers' arrest under this Court's ruling in *Draper, supra,* and its progeny.

Petitioner would also argue that the Sixth Circuit's failure to apply the clearly erroneous standard of Fed. R. Civ. P. Rule 52(a) in reversing the Trial Court's determination of probable cause is contrary to authority of this court and of the Sixth Circuit itself. As the determination of probable cause rests on a factual basis, mandatory application of the clearly erroneous standard is beyond argument. This Court has consistently held the clearly erroneous standard for appellate review of factual findings under Rule 52(a) is a deferential one and an appellate court cannot simply reverse a trial court's factual determination simply because the appellate court would have weighed the evidence differently; *Amadeo* v. *Zant,* 486 U.S. 214 (1988). Indeed, the Sixth Circuit itself has held that in applying the clearly erroneous standard, due regard should be given to the opportunity of the Trial Court to judge the credibility of witnesses and that findings of fact are presumptively correct; *J. A. Jones Const. Co.* v. *Englart Engineering Co.,* 438 F.2d 3 (6th Cir. 1971). The presumptive correctness of the trial court's determination

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court made this determination was (1) Heavrin's discovery of a pill bottle with no label affixed to the outside but an unattached prescription label inside; (2) Jeffers indentification of the pill as "allergy medication" being a "common answer" to police inquiry of suspicious drugs; (3) verification of her suspicions when her sergeant advised her a narcotics officer had identified the pills as Valium. App. 35a. All of these facts are uncontroverted in the trial court record.

of fact and the necessity that they be found clearly erroneous before they can be set aside is uniformly applied throughout the circuits; see, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976); *Ten Braak* v. *Waffle Shops, Inc.*, 542 F.2d 919 (4th Cir. 1976); *Constructora Maza, Inc.* v. *Banco de Ponce*, 616 F.2d 573 (1st Cir. 1980); *Magna Weld Sales Co.* v. *Magna Alloys & Research Pty., Ltd.*, 545 F.2d 668 (9th Cir. 1976); *United States* v. *Denver & R.G.W.R. Co.*, 547 F.2d 1101 (10th Cir. 1977). In the instant case, despite the Trial Court's finding of uncontroverted fact as to the basis for its determination of probable cause, the Sixth Circuit substituted its view of the evidence contrary to Rule 52(a). Having done so, the Sixth Circuit's opinion is contrary to a plethora of authority from the other circuits as well as the decision of this Court with respect to the clearly erroneous standard.

Finally, the Sixth Circuit failed to apply the doctrine of qualified immunity to the probable cause issue even though it specifically recognized the defense is available to Officer Heavrin on remand. Because qualified immunity from suit is a question of law, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the Court of Appeals should have examined the qualified immunity issue in the context of the probable cause question and ruled upon it since it had been fully litigated in the Trial Court and argued to the Sixth Circuit in breifs by the parties.

Under the bedrock case of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), Officer Heavrin is:

> . . . shielded from liability for civil damages insofar as [her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at p. 818 (citations omitted).

In a Section 1983 arrest context, this standard has evolved to grant immunity to an officer who exercises "reasonable professional judgment" in a situation requiring a determination as to whether probable cause exists for an arrest. *Malley* v. *Briggs*, 475 U.S. 335, 345-346 (1986).[7] Indeed, *Malley* states.

> "only where the [arrest] is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost." (citation omitted) *Malley, supra,* at pp. 344-345.

Thus, *Malley* makes it clear that qualified immunity is available ". . . to all but the plainly incompetent or those who knowingly violate the law." *Id.* at p. 341. This is in accord with a number of other decisions of this Court and other jurisdictions on the issue of qualified immunity, generally, and with specific application to a probable cause determination. Only where it is clear to a reasonably well-trained and competent officer that he or she is violating the law, will immunity not be available as a defense; see *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (". . . [i]n the light of preexisting law the unlawfulness must be apparent" to the officer); accord: *Shields* v. *Burge*, 874 F.2d 1201, 1205 (7th Cir. 1989). Even where there is a question as to the existence of probable cause, upon which reasonable minds could differ, the officer is still entitled to immunity; see, *United States* v. *Leon*, 468 U.S. 897 (1984); *Mitchell* v. *Forsyth, supra.* One of the more concise statements of the application of qualified immunity to a probable

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[7] *Malley* dealt with an officer's affidavit in support of an application for an arrest warrant, but the probable case standards are the same, see *Whiteley* v. *Warden*, 401 U.S. 506 (1971).

cause determination is found in *Gorra* v. *Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) where the Eighth Circuit opined:

> . . . qualified immunity protects law enforcement officers in cases in which they "reasonably but mistakenly conclude that probable cause is present * * *." [citation omitted]. Actual probable cause, therefore, is not necessary for an arrest to be objectively reasonable. Under this standard, all public officials are protected except the "plainly incompetent" and those who are deemed to have "knowingly violate[d] the law." [citation omitted].

In sum, the separation of the probable cause issue from the qualified immunity defense does not accord with applicable Supreme Court decisions and those of other courts of appeals. If there is to be consistency in the appellate courts with respect to the determination of probable cause and the application of qualified immunity thereto in the context of Section 1983 litigation, it is necessary for this Court to grant certiorari and establish a "bright line" rule. Here, the Sixth Circuit reversed and remanded to the Trial Court a fully litigated case for the Trial Court to make a decision on a question of law, i.e., the qualified immunity issue. As a matter of judicial economy and simple logic, it makes no sense to remand a question of law and subject the case to a second appeal by the losing party when the appellate court has the ability to determine the legal issue in the first instance. Certainly, such a circumstance does not comport with this Court's many decisions on qualified immunity, a defense which is meant to shield public officials from unnecessary litigation. If the doctrine of qualified immunity is to have any teeth, this Court should require the appellate courts to adjudicate the immunity issue, especially in the fully litigated case such as this, rather

than allowing them to bounce litigants back and forth to the trial court and engendering wasted time, attorneys fees and judicial resources.

CONCLUSION

While the questions Petitioner presents to this Court for issuance of a writ of certiorari are not particularly complicated, they do involve important federal questions which the Sixth Circuit has decided in conflict with applicable decisions of this Court or in such a manner as to call for an exercise of this Court's power of supervision. The Petitioner will now set forth the specific issues Petitioner believes this Court should examine.

Torres v. *Oakland Scavenger Co., supra,* established that FED. R. APP. P. 3(c) contains prerequisites for the acquisition of appellate jurisdiction. They are mandatory and not subject to either a "harmless error" or "substantial compliance" standard. The various courts of appeals, however, have restrictively interpreted *Torres* as being applicable only to the party designation portion of Rule 3(c) and have liberally, but inconsistently, interpreted the judgment designation portion of the Rule as being non-jurisdictional in most instances. The inconsistent and illogical treatment of the various requirements of Rule 3(c) defies the simple mandatory language of the Rule and creates a paradox whereby the party designation requirement is jurisdictional, the judgment designation portion is sometimes jurisdictional and sometimes not, and the court designation portion has yet to be tested. A simple reading of *Torres* indicates all aspects of Rule 3(c) are jurisdictional prerequisites. Nevertheless, it is obvious from the instant case and the other cases cited in this Petition that the courts of appeals need direction from this Court to

resolve the matter once and for all. For that reason, the Court should grant certiorari on this issue.

Similarly, the Sixth Circuit's decision on the probable cause issue in this case was contrary to applicable decisions of this Court, ignored the "clearly erroneous" standard of FED. R. CIV. P. 52(a) and, in any event, failed to determine the application of qualified immunity to the probable cause issue. The Sixth Circuit relied simply on *Illinois* v. *Gates, supra,* in its determination Officer Heavrin lacked probable cause to arrest the respondent. As *Gates* addresses probable cause in the context of suppression of evidence rather than a warrantless arrest, the Sixth Circuit misapplied that authority and should have utilized *Draper* v. *United States, supra,* and its progeny. The Sixth Circuit compounded its misapplication of the law by failing to follow the "clearly erroneous" standard of FED. R. CIV. P. 52(a) since it ignored the Trial Court's findings of fact on the probable cause issue, manifestly contrary to the Court's authority in *Amadeo* v. *Zant, supra,* the Sixth Circuit's own authority in *J. A. Jones Const. Co.* v. *Englert Engineering Co., supra,* as well as applicable authority from the other courts of appeals. On this basis alone, certiorari should be granted if only to rectify the Sixth Circuit's failure to adhere to the clearly erroneous standard as determined by this Court in *Amadeo* v. *Zant.*

Finally, the Sixth Circuit further compounded its several errors on the propable cause issue by failing to determine the application of qualified immunity to the Respondent's arrest. Despite acknowledging the availability of the qualified immunity defense to Officer Heavrin, the Sixth Circuit merely remanded the case to the Trial Court even though the case had been fully litigated below and the qualified immunity defense had been preserved and

argued both in the Trial Court and the Sixth Circuit. As this Court has consistently held, the qualified immunity defense is a question of law and, as such, is reviewable de novo by an appellate court. Indeed, if this Court's opinions in *Harlow* v. *Fitzgerald, Mitchell* v. *Forsyth, Anderson* v. *Creighton* and *Malley* v. *Briggs,* are to be given any deference, the appellate courts should not remand qualified immunity questions to trial courts which have already fully litigated the entire case. Permitting a court of appeals to do so, including the Sixth Circuit, ignores the true purpose of the qualified immunity defense as an immunity from suit and the prevention of needless litigation. This Court should grant certiorari to exercise its supervisory power and establish a firm rule requiring appellate courts to determine qualified immunity issues presented to them in fully litigated cases so as to preclude unnecessary remands and the possibility of a second appeal.

Based on the foregoing authorities and arguments, the Petitioner respectfully requests the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 89-5994/6059

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONY JEFFERS, - - - - *Plaintiff-Appellant, Cross-Appellee,*

v.

DEBBIE HEAVRIN; JEFFERSON COUNTY, KENTUCKY, - - - - *Defendants-Appellees, Cross-Appellants,*

CHURCHILL DOWNS, INC., - - *Defendant-Appellee,*

CITY OF LOUISVILLE, - - - - - - *Defendant.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed May 13, 1991

Before: GUY and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

GUY, Circuit Judge, delivered the opinion of the court, BOGGS, Circuit Judge, (pps. 10-13), delivered a separate opinion concurring in part and dissenting in part. EDWARDS, Senior Circuit Judge, (pps. 14-15), delivered a separate opinion concurring in part and dissenting in part.

RALPH B. GUY, JR., Circuit Judge. Plaintiff, Tony Jeffers, appeals from a judgment entered after a bench trial in favor of defendants in this 42 U.S.C. § 1983 action. Jeffers claimed damages stemming from an alleged illegal search and seizure and a subsequent arrest and prosecution.

Defendants Heavrin and Jefferson County cross-appeal, although no relief was granted against them. The basis of the cross-appeal is that the court's opinion contains language gratuitously criticizing the performance of Officer Heavrin and county corrections officers. The district judge also concluded that "although Jeffers' complaint sufficiently makes a separate claim for damages as a result of negligent prosecution, damages were not established during trial with the specificity required in order for this Court to render an award." *Jeffers v. Heavrin,* 701 F. Supp. 1316, 1326 (W.D. Ky. 1988).

Upon a full review of the record, we conclude that there was a lack of probable cause for arrest and we reverse and remand.

I.

On May 7, 1983, Jeffers, in the company of three friends, arrived at Churchill Downs in Louisville, Kentucky, for the purpose of attending the 1983 running of the Kentucky Derby. This annual event attracts a crowd of approximately 130,000 persons. Since the crowd exceeds the seating capacity of the race track, for this one event only patrons are admitted to the infield of the track in numbers up to 75,000. There is no fixed seating in the infield.

Jeffers, who had attended several previous Derbys, intended to sit in the infield and so arrived at the track very early to ensure a favorable location. Since it was to be a long day, Jeffer's group was equipped with a cooler, blankets, sleeping bags, and groceries. Jeffers was aware of the track policy of not allowing certain items to be brought into the premises. Large signs were conspicuously posted, which read:

> "NOTICE GRILLS, CHARCOAL, BOTTLES, WEAPONS AND ANY ITEM WHICH MAY BE USED AS A WEAPON OR A MISSILE, WHICH

COULD BE USED TO INJURE THE GENERAL PUBLIC ARE EXPRESSLY FORBIDDEN IN AND ON CHURCHILL DOWNS PROPERTY. PATRONS MUST TAKE THEIR PARCELS BACK TO THEIR VEHICLES, DEPOSIT SUCH ITEMS IN A DUMPSTER OR SUBJECT ITEMS TO INSPECTION BY POLICE."

Jeffers, 701 F. Supp. at 1318-19. Loudspeakers regularly issued the same warning. This policy had existed at Churchill Downs since the mid-sixties and was prompted by drunken and unruly crowds in the infield that led to a number of personal injuries. Although the Jefferson County Police Department (JCPD) patrolled the infield, the persons charged with enforcing the track policy were private security guards hired by Churchill Downs.

Despite these efforts at crowd control, the problems being generated by the infield crowd continued and, in 1981, JCPD requested permission from Churchill Downs to take over the infield gate inspection responsibility. The track agreed, and in each subsequent year this procedure continued.

When Jeffers and his friends arrived at the gate, they knowingly and willingly subjected themselves to a search of the coolers and grocery bag. No personal or pat-down searches were conducted. Defendant Heavrin happened to be the JCPD officer at the gate, and it is not disputed that she was courteous and professional. In the course of looking into the grocery bag, defendant Heavrin came across an obviously opened canister of Pringles potato chips. When Heavrin picked up the can, it was apparent that it was too heavy to contain potato chips. Upon opening the container, she found plastic eating utensils, chewing gum, napkins, and a small amber bottle containing pills. There was no label on the outside of the bottle, but inside was an unattached prescription label and several pills. What

happened next is accurately described in the district court opinion:

> When Heavrin inquired about the pill bottle, Jeffers replied that it contained his allergy medication. Officer Heavrin "thought he was probably lying," because it was a "common answer" to inquiry by police about pills. Being unexperienced in the identification of drugs, she asked Sergeant Robert Jones to have a narcotics officer examine the pills. Sgt. Jones testified at trial that he did not remember the incident involving Jeffers, but was identified by Heavrin as the colleague to whom she gave the pills. . . .

Officer Heavrin testified that Sgt. Jones left with the pill bottle and returned in about a minute, saying "He thinks they're valium. You can either charge him or throw them away." (At trial, each of the narcotics officers who were at the track testified that he did not remember being asked to identify any pills as valium, and would not have identified Jeffers' pills as valium.) Jeffers asked Heavrin to call his doctor or allow him to do so, but Heavrin did not answer. Heavrin chose to arrest Jeffers and took him to a temporary holding facility located at the track at 8:44 a.m.

Heavrin filled out an arrest slip, listing "Drugs in improper container" as the charge against Jeffers. She turned the pill bottle over to a narcotics officer to have them sent for a laboratory analysis. After completing the forms, Heavrin returned to her duty at the gate. . . .
Jeffers v. Heavrin, 701 F. Supp. 1316, 1320 (W.D. Ky. 1988).

It was midnight before Jeffers was processed and released on bail, and his trial was set for June 1, 1983, in Louisville. During the time he was being processed, he re-

ceived rude and inconsiderate treatment but was not physically abused in any way.

In preparation for trial, Officer Heavrin sought the results of the lab analysis on May 13, 1983, but the tests had not been completed. The results were completed on May 23, 1983, but Heavrin made no further inquiry and simply called the court on June 1 to say she would not be there because the lab report was not ready. Had she read the report, she would have learned that it confirmed the pills were allergy medication, just as Jeffers had indicated. Since Jeffers was never told the case was to be adjourned, he needlessly travelled from his home in Ft. Wayne, Indiana, to Louisville for the trial. A new trial date was set for June 22, 1983.

In the interim, Heavrin learned of the negative lab report, but she took no action and discussed it with no one. On June 22, she did not appear in court because of a doctor's appointment. Jeffers, again having driven from Ft. Wayne was present, and when the prosecutor was unable to go forward with the case, it was dismissed. This lawsuit followed.

II.

We conclude, as did the district judge, that the gate search was consensual. Because we reverse on other grounds, we find it unnecessary to discuss at length the consent issue. We do note in passing, however, that difficult legal issues are involved. If Churchill Downs had enacted a policy of restricted entry and enforced it itself, problems of a constitutional dimension would not be implicated. When a police department is given the right to be the enforcer, however, it raises questions as to the limits of the authority to conduct general searches without any particularized showing of probable cause or even reasonable suspicion. There is no doubt that an important public purpose was served. If the amount of alcohol, weapons,

and potential missiles brought into the infield could be controlled, fewer problems and injuries would result. The history of the enforcement and success of this rule proves that to be the case. However, it might be equally efficacious to set up a road block and search all cars headed for the race track. Notwithstanding the recent ruling in *Michigan Department of State Police v. Sitz*, U.S. ——, 110 S. Ct. 2481 (1990), it is doubtful that anyone would seriously contend that such action would pass constitutional muster.[1] Thus, in concluding that the search was consensual, we decide no more than that Jeffers knowingly, willingly, and voluntarily submitted to the search. We leave for another day the issue of whether the police can use the entry policy of a private entity to generate "consent" and thus justify a search that otherwise would be beyond the power of the police agency to conduct. The dangers inherent in this scenario serve as the backdrop for our discussion of the probable cause issue.

III.

If the gate searches had continued to be totally private and conducted by private security guards, what occurred in this case could not have happened. The security guards, based on what they discovered, would simply grant or deny entry. There would be no further ramifications. However, if a police officer conducts this search and finds no prohibited articles, but in the course of the search discovers, for example, an unregistered firearm, the matter does not rest there. Notwithstanding the specific function that

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[1]In the case of drunk-driver roadblocks, the driver, if intoxicated, is committing an offense in the presence of the police authority. In the case at bar, it was not an offense to have bottled beer in a cooler. The officers were conducting a search for "contraband" that was not illegal but merely prohibited as a result of the entry policy of a *private* entity.

Officer Heavrin was temporarily performing at the gate, she was nevertheless at all times a police officer and bound to enforce and not overlook violations of the law even if totally unrelated to her gate searches. Stated another way, the possible ramifications of Jeffers's "consent" are considerably different if a police officer, as opposed to a private security guard, conducts the search—as Jeffers found out to his detriment.

Although voluntary consent is the substitute for probable cause as to the initial search, when it comes to the arrest, the officer must have independent probable cause. We simply cannot find probable cause in the "totality of the circumstances" presented here.[2] The pill bottle contained no substance that Officer Heavrin recognized as a controlled substance. Jeffers offered a believable explanation for what was in the bottle and even offered to call, or have the officer call, his doctor. There was nothing suspicious about the circumstances. Jeffers and his friends were obviously headed for the infield to stake out a good viewing site for the Derby. They met no "profiles," nor were there any other indications in their appearance or decorum to suggest illegal drug involvement. In context, there was nothing any more suspicious about the pill bottle in the Pringles can than there was about the plastic utensils and chewing gum being there. It was obvious that the purpose of the can was to segregate small articles in one container before putting them in the larger grocery bag.

To the degree that the pills were themselves identifiable, it was by the markings "DAN" on one side and "5058" on the other. The Physicians' Desk Reference, which incidentally was available to Officer Heavrin, lists the generic allergy medication PBZ as containing these identifying symbols.

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[2] *Illinois* v. *Gates*, 462 U.S. 213 (1983).

We cannot attach much significance to Officer Heavrin's attempt to have another officer identify the pills. We never learned who that officer might have been, and the four narcotics officers who were on the premises not only deny making any identification of the pills or valium but also indicate it would have been clear to them that the pills were not valium. Under these circumstances, we are forced to conclude that the requisite probable cause for an arrest was lacking. In reaching this conclusion, we do not foreclose an argument upon remand that Officer Heavrin, although in the wrong, may nonetheless be entitled to qualified immunity. We pass no judgment on the merits of such an argument, if made.

IV.

We also conclude the court erred in determining that damages were not proved with sufficient specificity to be awarded. Although damages of the type incurred here do not generate paid receipts or documented out-of-pocket expenses or losses, they are not speculative and appear, to us at least, relatively easy to compute.

Due to our ruling on the probable cause issue, we pass no judgment on the viability of a "negligent prosecution" theory.[3] It may well be that this theory will now be subsumed by the probable cause determination, since it would appear the damages would be the same under either theory.

V.

Jeffers has conceded on appeal that if we uphold the "consent" search and decide the case on the arrest issue that Churchill Downs is no longer implicated. We believe

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[3]If such a theory exists, it would have to be a pendent state claim, since negligent conduct will not support a section 1983 action.

that to be the correct result and the track should be dismissed from any further proceedings in this manner.

We also conclude that Officer Heavrin's arrest decision was a random act and not done pursuant to a county policy, so Jefferson County should also be dismissed from this case.

VI.

Inasmuch as this was a bench trial, we *REVERSE* and *REMAND* for further proceedings consistent with this opinion.

BOGGS, Circuit Judge, concurring in part and dissenting in part. I disagree with Judge Guy's opinion in only one respect. The opinion holds that, as a matter of law, Officer Heavrin did not have probable cause to make the arrest. However, the opinion indicates that the officer did no wrong in searching the containers Jeffers was carrying into the Churchill Downs infield, in finding the small pill bottle, or in opening the bottle and examining the contents.

Given that Heavrin's conduct was permissible to that point, when she arrested Jeffers, she knew the following facts.

(1) Some type of pill was being carried in a bottle with no label attached to the outside, and an otherwise unidentified label, but not for valium, was lying loose on the inside of the bottle. *J.A.* at 325. (However, we might infer that the label indicated the pills were allergy medication, since that is what they turned out to be).

(2) Kentucky has a state law forbidding the possession of controlled drugs in a container other than the original prescription container. KY. REV. STAT. § 218A.210. Other statutes forbid mislabeling any drug. *Id.* §§ 217.175 (2) & 217.065(1).

(3) According to her story, Heavrin asked a fellow officer to have the pills identified, and that officer reported

back to her that the pills were valium. *J.A.* at 117-118; 123; 314.

On these facts, Heavrin had probable cause to believe that, indeed, prescription drugs were being carried in an improper container. The record of her examination by counsel for the plaintiff makes it quite clear that this was the reason she arrested Jeffers. In pertinent part, the transcript reads as follows.

> Q. At the time that you arrested Mr. Jeffers, did you feel as though you had probable cause to make an arrest?
>
> A. Yes, sir, I did.
>
> Q. Will you tell us what facts you based that opinion on at that time?
>
> A. The fact that the pills were identified by one of our narcotics detectives as being Valium.
>
> *J.A.* at 314
>
> Q. Okay. Will you tell the Court any facts that you have which cause you to believe that even if this was Valium[,] Mr. Jeffers was committing a criminal offense, do you have any facts?
>
> A. The label in the container identified it as something else.
>
> *Id.* at 325.

Under the circumstances of Derby morning, Officer Heavrin can hardly be faulted for not having left the post to which she had been assigned to attempt to consult personally the Physician's Desk Reference that the court indicates was available.

The difficulty with the argument I have just made is that the district court's opinion does not agree with Heavrin's story. According to the district court, as correctly

quoted in our court's opinion, Sgt. Jones, to whom she had given the bottle for identification,[1] returned and said:

> He thinks they're valium. You can either charge him or throw them away.

Jeffers v. Heavrin, 701 F. Supp. 1316, 1320 (W.D. Ky. 1988).

Our court is not impressed with the efficacy of this remark as providing probable cause. I agree that it is a bit thin. However, that is *not* the remark that appears in the record. Instead, the only rendition of this event that is in the record is Heavrin's unequivocal statement.

> He told me that the pills were valium and I could charge Mr. Jeffers if I wanted to.
>
> *J.A.* at 123.

On this view of the facts, the general rule that an officer may rely on facts known to other officers and relayed to the arresting officer comes into play. *United States v. Ventresca*, 380 U.S. 102, 110-11, 85 S. Ct. 741, 746-47 (1965); W. LaFave, 2 Search and Seizure: A Treatise on the Fourth Amendment § 3.5 (2d ed. 1987). This rule holds even if the facts as related turn out to be erroneous in good faith. *See United States v. Cummins*, 912 F. 2d 95, 102-03 (6th Cir. 1990).

To the extent the district court found as a fact that Sgt. Jones made the statement quoted in the district court's opinion, the court is clearly in error. It simply is not in the record.

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[1]This is according to Heavrin. Jones does not remember the specific incident, although he did, on several occasions that morning, take items to narcotics officers for identification and report the result to an investigating officer. *J.A.* at 84.

If the district court disbelieves Heavrin's testimony as to what she was told, then I have no problem with a finding of no probable cause. However, the district court has not done so. On the state of this record, Officer Heavrin should not be faced with a flat holding that no probable cause could have existed. *See Dominque v. Telb,* 831 F. 2d 673, 676, (6th Cir. 1987) plaintiff required to show that rights were so clearly established that any reasonable officer would have clearly understood conduct violated those rights.) I appreciate the court's distinction (p. 8) that Heavrin may still have a qualified immunity defense if some reasonable officer could have thought that probable cause exists on these facts. This may be cold comfort, however, in light of our court's holding on the law, and our acceptance of the district court's clarly erroneous rendition of the testimony. I would, therefore, remand for further fact-finding on this issue, and I respectfully dissent from that portion of the court's opinion that instead decides that there was no probable cause as a matter of law.

EDWARDS, Senior Circuit Judge, concurring in part and dissenting in part. I agree that there was no probable cause for the arrest. Nonetheless, I part from the majority on one issue. The opinion upholds the warrantless search of a Kentucky Derby patron's allergy pill bottle as legal. This, I cannot do, and therefore, dissent.

First, I recognize, of course, that crowd control is a major problem at the Kentucky Derby. I agree that the warrantless police searches were conducted with an important purpose in mind, to protect the patrons of the Derby. However, I question whether the searches were more intrusive than reasonably necessary to accomplish the underlying purpose of preventing violence. The police searched not only for bottles, weapons, and missiles, but also for items which posed no risk, such as the allergy pills in Mr. Jeffers' prescription vial. Thus, in my view, the scope of

the searches was unreasonable because it was not logically linked to any perceived or real danger. That is, the police went too far. *U.S. v. $124,570 U.S. Currency,* 873 F. 2d 1240, 1243-47 (9th Cir. 1989); *See Terry v. Ohio,* 392 U.S. 1, 17-19 (1967); *See generally* W. La Fave, *4 Search and Seizure,* § 10.7(a) at 40-42 (2d ed. 1987).[1]

Second, even assuming arguendo that warrantless police searches of all Derby patrons are legal, Officer Heavrin's search of Mr. Jeffers' prescription bottle can still not be justified on this broad basis. The authority for the search policy was limited in scope to its express purpose, here, to detect alcohol, weapons, and missiles. These items could not plausiby rest inside a small pill vial (the contends of which were visible from the outside). Therefore, Officer Heavrin went beyond the scope of the search when she opened Mr. Jeffers' pill bottle, and to this extent, the search was illegal. Officer Heavrin went too far. *U.S. v. $124,570 U.S. Currency,* 873 F. 2d 1240, 1244-48 (9th Cir. 1989); *See Camara v. Municipal Court,* 387 U.S. 523 (1967).

My third concern follows from the other two. When Mr. Jeffers entered Churchill Downs, he could not have plausibly consented to a future search that would go beyond its own express limits. Therefore, when the police did go too far, they should not be shielded by the "troublesome doctrine" of implied consent. W. La Fave, *4 Search and Seizure,* § 10.7(a) at 41-42 (2d ed. 1987); W. La Fave, *3*

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[1]I may add that courts dealing with similarly intrusive searches at public events have also come to this conclusion. *See, e.g. Wheaton* v. *Hagan,* 435 F. Supp. 1134 (M.D.N.C. 1977); *Collier* v. *Miller,* 414 F. Supp. 1357 (S.D. Tex. 1976); *Stroeber* v. *Commission Veteran's Auditorium,* 453 F. Supp. 926 (S.D. Iowa 1977); *Jacobsen* v. *City of Seattle,* 648 P.2d 653 (Wash. 1983); *State* v. *Carter,* 267 N.W. 2d 385 (Iowa 1978); *Nakamoto* v. *Fasi,* 635 P.2d 946 (Hawaii 1981).

Search and Seizure, § 8.2(1) at 220 (2d ed. 1987); *Serpas v. Schmidt*, 827 F. 2d 23, 29 (7th Cir. 1987); *U.S. v. $124,570 U.S. Currency*, 873 F. 2d 1240, 1247-48 (9th Cir. 1989).

Accordingly, I would reverse and remand consistent with this determination.

No. 89-5998/6059

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONY JEFFERS, - - - - *Plaintiff-Appellant, Cross-Appellee,*

v.

DEBBIE HEAVRIN; JEFFERSON COUNTY, KENTUCKY, - - - - *Defendants-Appellees, Cross-Appellants,*

CITY OF LOUISVILLE, Et Al., - - - *Defendants,*

CHURCHILL DOWNS, INC., - - *Defendant-Appellant* (89-5994)

ORDER—Filed July 3, 1991

BEFORE: GUY and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court

(s) Leonard Green
Leonard Green, Clerk

No. 89-5994

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONY JEFFERS, - - - - *Plaintiff-Appellant Cross-Appellee*

v.

DEBBIE HEAVRIN; JEFFERSON COUNTY, KENTUCKY - - - - *Defendants-Appellees Cross-Appellants*

CITY OF LOUISVILLE; CHURCHILL DOWNS, INC. - - *Defendants-Appellees*

ORDER—Filed November 20, 1989

BEFORE: WELLFORD and NELSON, Circuit Judges; and SUHRHEINRICH, District Judge*

The plaintiff appeals judgment in favor of the defendants dismissing his civil rights action arising from his arrest and prosecution. Two of the defendants-appellees move to dismiss the appeal on the grounds that the notice of appeal did not sufficiently designate the judgment being appealed. The plaintiff has not responded.

The district court entered its findings of fact and conclusions of law and judgment for the defendants on October 18, 1988. The defendants filed a timely motion to alter or amend the judgment. On July 6, 1989, the district court entered an order which amended its findings of facts and

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*The Honorable Richard Suhrheinrich, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

conclusions of law in one respect and denied all other aspects of the motion to amend. (Although entered on July 6, the order bore the date of July 7). The plaintiff filed a timely notice of appeal which stated that appeal was taken "from the final judgment entered on July 7, 1989."

Misidentification of the ruling being appealed from does not destroy appellate jurisdiction as long as the appellant's intent is apparent and the appellee suffers no prejudice. *United States* v. *Willis*, 804 F.2d 961, 963 (6th Cir. 1986); *Taylor* v. *United States*, 848 F.2d 715, 717 (6th Cir. 1988); *McLaurin* v. *Fischer*, 768 F.2d 98, 101 (6th Cir. 1985) *See also Peabody Coal Company* v. *Local Union Nos. 1734, 1508 and 1548*, U.M.W., 484 F.2d 78 (6th Cir. 1973). Having reviewed and considered the defendants arguments, we conclude that the defendants had notice that the plaintiff intended to appeal from the final judgment and that the defendants have failed to demonstrate prejudice.

It is therefore ORDERED that the motion to dismiss be denied.

Entered By Order Of The Court

(s) Leonard Green
Clerk

No. 89-5994/6059

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONY JEFFERS, - - - - *Plaintiff-Appellant Cross-Appellee,*

v.

DEBBIE HEAVRIN; JEFFERSON COUNTY, KENTUCKY - - - - *Defendants-Appellees Cross-Appellants*

CITY OF LOUISVILLE, - - - - - *Defendant*

CHURCHILL DOWNS, INC., - - *Defendant-Appellee*

ORDER—Filed August 2, 1990

BEFORE: WELLFORD, NELSON and SUHRHEINRICH, Circuit Judges.

The plaintiff appeals a judgment for the defendants which dismissed his civil rights action arising from his arrest and prosecution. The defendants previously moved to dismiss this appeal on grounds that the notice of appeal did not sufficiently designate the judgment being appealed. That motion was denied. The defendants now renew the motion to dismiss and ask for reconsideration of that motion in light of this Court's decision in *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir. 1990) (en banc). The plaintiff responds in opposition. Upon review and consideration, we conclude, for the reasons stated in our prior order, that this Court has appellate jurisdiction.

It is therefore ORDERED that the defendant's renewed motion to dismiss is denied.

Entered By Order Of The Court

(s) Leonard Green
Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-84-0211-L(M)

TONY JEFFERS - - - - - - - - *Plaintiff*

v.

DEBBIE HEAVRIN,
CITY OF LOUISVILLE, KENTUCKY,
JEFFERSON COUNTY, KENTUCKY, and
CHURCHILL DOWNS, INC., - - - - *Defendants*

October 18, 1988

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

MEREDITH, District-Judge

This matter is before the Court for judgment. The case was tried before the Court in June of 1986 and the parties were granted additional time in which to prepare and submit post-trial briefs. The Court being otherwise sufficiently advised, now enters its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Churchill Downs is a thoroughbred horseracing facility owned and operated by Churchill Downs, Inc., a private corporation. Each year on the 1st Saturday in May, Churchill Downs holds the world-famous Kentucky Derby. In 1967 or 1968, Churchill Downs instituted a policy of inspecting patrons for alcohol on all days the track was open. Private or "merchant" police were employed to conduct the searches, which consisted chiefly of a visual in-

spection of an individual's parcels while the individual moved the contents around. A Churchill Downs official testified that because people frequently brought food it was felt that the private police should not use their hands. This policy was founded primarily on the premise that drunkenness would be minimized by preventing patrons from bringing their own alcohol to the track. Churchill Downs continued and still continues to sell both beer and liquor inside the grounds at what some would consider inflated prices.

Also beginning in the late sixties, at the request of Churchill Downs, the Jefferson County Police Department ("JCPD") patrolled the infield area of the Downs on Derby Day. The infield is the area inside the one mile oval racetrack. There is no seating in the infield, and it is open to spectators only on the day of the Kentucky Derby. In recent years, attendance in the infield has been approximately 75,000 people.

This decision for the JCPD to patrol the infield was unrelated to the decision to search for alcohol, but arose out of concerns that the Derby might be disrupted due to disturbances and protests in earlier years over the passage of "open housing" legislation. Each year thereafter, Churchill Downs requested the JCPD to provide infield patrols at the Derby, and the JCPD did so. The City of Louisville Police patrols the Grandstands and Clubhouse areas as well as parking lots. Other law enforcement agencies, including the Kentucky State Police, the FBI, the National Guard, and the Secret Service, have also provided security in past years.

In February 1981, the JCPD informed Churchill Downs by letter of its intention to extend its patrons to include conducting the inspection at the gates to the infield. The JCPD was concerned about the number of injuries to members of the public and to police officers occurring in

the infield, and believed that the private police were not adequately inspecting patrons' parcels. Numerous fights, injuries from thrown and broken glass, and instances of abuse of women were cited at trial as other particularized reasons which prompted the letter. The JCPD believed that certain items should be excluded, and that its officers were better trained to screen patrons' parcels at the gate.

The letter listed items which the JCPD wanted to search for, and requested that Churchill Downs post signs at the entrances informing patrons of the fact that such items were prohibited and that their parcels would be searched for them. These prohibited items included "grills, charcoal, bottles, cans, weapons, and any item which may be used as a weapon or missile."

In response to the letter and to complaints from the manager of the track's nursing service about the number or injuries, Churchill Downs agreed to allow the JCPD officers to conduct the searches at the infield gates. Both Churchill Downs and the JCPD agreed that the final decision of whether to allow the JCPD officers to conduct the searches was made by Churchill Downs. Large signs were posted which read: "NOTICE: GRILLS, CHARCOAL, BOTTLES, WEAPONS AND ANY ITEM WHICH MAY BE USED AS A WEAPON OR A MISSILE, WHICH COULD BE USED TO INJURE THE GENERAL PUBLIC ARE EXPRESSLY FORBIDDEN IN AND ON CHURCHILL DOWNS PROPERTY. PATRONS MUST TAKE THEIR PARCELS BACK TO THEIR VEHICLES, DEPOSIT SUCH ITEMS IN A DUMPSTER OR SUBJECT TO INSPECTION BY POLICE." These signs were identical to that suggested by police, except for the exclusion of cans as forbidden items. Cans were not included because phone receptionists at the track had told callers that soft drink cans would be permitted. Churchill Downs agreed that all other items suggested by the police

should be prohibited. The signs were positioned at the entrances so that they could be seen by those waiting in line to pay admission. In addition, Churchill Downs continually played over loudspeakers a taped announcement which read the sign, stated that the alcoholic beverages were also prohibited, and gave ticket information.

Each year since 1981 the search procedure has been substantially the same. JCPD officers conduct the seacrhes at the infield gate and are relieved in the afternoon by the private police, who also conduct the searches at other gates during the entire day. Every patron who enters the track with a parcel must submit the parcel to a search, while those who do not have parcels may enter through separate turnstiles. Generally two officers are placed behind each turnstile to search parcels after patrons have paid admission. Additionally, officers are instructed to "pat-down" individuals wearing unusually bulky or unseasonably warm clothing. Each search requires only a brief stop of the person. Confiscated items which individuals do not return to their cars are thrown into a dumpster. In an attempt to avoid confiscation, patrons often go to unusual or extreme measures, to "smuggle in" forbidden items, especially alcohol.

Since 1981, the number of injuries on Derby Day requiring treatment has significantly decreased. The total number of people treated at first aid stations has dropped from approximately 400-450 to 300. The number of cuts requiring sutures has dropped by at least fifty per cent, and from a high of 50 or more to 10 or fewer. Whereas prior to 1981 most of the cuts were caused by broken glass (16-20), now only 4 or 5 cuts per year needing sutures are caused by glass. Injuries from fights have dropped by about half as well.

On May 7, 1983, Tony Jeffers, of Fort Wayne, Indiana, left Muncie, Indiana, with three friends early in the morn-

ing for the four hour trip to Louisville to attend the Derby. Among the various items they brought with them were blankets, a cooler, and a grocery bag. The bag contained food items such as bags of cookies and potato chips as well as a used Pringles Potato Chips can. In the can, Jeffers had placed plastic utensils, chewing gum, napkins, and a small amber pill bottle containing allergy medication.

Jeffers and his friends arrived at the track Central Avenue gate around 7:30 A.M. They waited 30-45 minutes before the line began moving and another 30-45 minutes before they reached the admission windows. Posted at that gate were four signs warning of the search procedure, and the taped announcement had been checked earlier by Churchill Downs' head of security and found to be clearly audible. Jeffers testified at trial, however, that during this time he neither saw the signs nor heard the taped announcement. The only sign Jeffers remembered ever seeing at Churchill Downs was one which stated that alcoholic beverages were prohibited. Nonetheless, Jeffers knew from past experience that his parcels would be searched by the police before he would be allowed to enter.

After paying admission, Jeffers and his friends proceeded to the search area. Officer Deborah Heavrin searched the cooler and grocery bag. Jeffers was not patted down as part of the search. Upon finding the Pringles' potato chip can inside the bag, Officer Heavrin believed the can to be to heavy to contain potato chips, and opened the lid to see if it contained any forbidden items. Emptying the can, Officer Heavrin found the small amber plastic pill bottle at the bottom of the can. There was no label affixed to the outside of the bottle, but an unattached prescription label was visible inside the bottle along with several pills.

When Heavrin inquired about the pill bottle, Jeffers replied that it contained his allergy medication. Officer Heav-

rin "thought he was probably lying," because it was a "common answer" to inquiry by police about pills. Being unexperienced in the identification of drugs, she asked Sergeant Robert Jones to have a narcotics officer examine the pills. Sgt. Jones testified at trial that he did not remember the incident involving Jeffers, but was identified by Heavrin as the colleague to whom she gave the pills. However, the trial took place three years after the incident, and Sgt. Jones did not even know about the lawsuit until shortly before trial. Given that set of facts, and the non-stop flow of people entering the track on that day, it is an altogether credible explanation that Sgt. Jones simply forgot about the incident.

Officer Heavrin testified that Sgt. Jones left with the pill bottle and returned in about a minute, saying "He thinks they're valium. You can either charge him or throw them away." (At trial, each of the narcotics officers who were at the track testified that he did not remember being asked to identify any pills as valium, and would not have identified Jeffers' pills as valium.) Jeffers asked Heavrin to call his doctor or allow him to do so, but Heavrin did not answer. Heavrin chose to arrest Jeffers and took him to a temporary holding facility located at the track at 8:44 a.m.

Heavrin filled out an arrest slip, listing "Drugs in improper container" as the charge against Jeffers. She turned the pill bottle over to a narcotics officer to have them sent for a laboratory analysis. After completing the forms, Heavrin returned to her duty at the gate. Jeffers testified that all times Officer Heavrin was polite and professional.

Jeffers was held in a smal cell with other arrestees at the holding facility for some time. While he was there, a police officer chose not to arrest a woman who had been brought in with four different pills, including valium, in one bottle. Jeffers asked the officer to examine his pills

but the officer refused. Jeffers was eventually transported dowtown to the jail facility at the Hall of Justice. There he underwent standard processing which included fingerprinting and a strip-search. Jeffers testified that whenever he said anything to a police or corrections officer, he was warned that if he didn't "shut up," he would spend the entire weekend in jail. It was not until about 10:00 p.m. that Jeffers appeared before a judge and paid his bail. Jeffers then was forced to wait until after midnight to get his property back, because officials inside the property room did not open the door, despite the presence of Jeffers and other who sought return of their property.

Jeffers was scheduled to appear for trial on June 1, 1983 in Louisville. Heavrin received her subpoena on or about May 13, and consulted her copy of the initial arrest slip (which contained Jeffer's home address). In accordance with procedure she contacted the narcotics or laboratory department to see if the lab report on the confiscated pills was complete. When Heavrin called, the lab report was not in, but it was completed by May 23, and showed that the pills were indeed allergy medication. Heavrin did not contact the lab a second time prior to the trial date to see if the report had arrived. She waited until the morning of the trial before calling the court clerk to say that she would not be there because the lab report was not ready. Jeffers had already travelled the four hours to Louisville from Fort Wayne, only to find that his case would be continued until June 22.

Heavrin received her second subpoena about a week before the new trial date, and by that time knew that the lab report was complete and showed no evidence of any illegal substance. Again, even after consulting her arrest slip, she did not contact anyone—not the prosecutor, the defense attorney, Jeffers, nor even the court clerk—about the lack of criminal evidence against him. On June 22,

Heavrin had a doctor's appointment and did not appear in court. She attempted to call the clerk that morning and left a message only that she would not be there. Heavrin expected the case to be either dismissed or continued until a third date. Again, Jeffers had driven down from Fort Wayne only to find the prosecution unprepared. This time, the charges were dismissed.

Conclusions of Law

The defendants first contend that Jeffers had no reasonable expectation of privacy in his parcels, and thus has no grounds for protesting the search. The Fourth Amendment protects people against only unreasonable intrusions on their reasonable expectations of privacy. The standard for determining a legitimate or reasonable expectation of privacy is whether (1) the person subjectively exhibits an expectation of privacy, and (2) society recognizes that expectation as reasonable. *Katz* v. *United States,* 389 U.S. 347, S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, concurring).

Jeffers expectation of privacy is first challenged on the grounds that he neither did have nor could have had any reasonable expectation that his parcel would not be searched prior to entering the track. The mere knowledge that one may be subject to search does not automatically render a person without any reasonable expectation of privacy. *Chenkin* v. *Bellevue,* 479 F.Supp. 207 (S.D.N.Y. 1979). The applies to private as well as public entities. Passengers on private airlines, for example, retain an expectation of privacy in their hand luggage even with the knowledge that they will be subject to a search as a precondition to boarding. *United States* v. *Davis,* 482 F.2d 893 (9th Cir. 1973). Thus Churchill Downs' status as a private corporation should not permit it to nullify an individual's legitimate expectation of privacy.

The reliance of Heavrin and the JCPD upon *United States* v. *Mankani,* 738 F.2d 538 (2nd Cir. 1984), is misplaced. That case concerned an incident in which officers were able to hear incriminating statements made by a defendant in an adjoining hotel room by listening through a pre-existing hole in the wall. The court admitted the evidence on the grounds that the hole prevented the defendant from having any legitimate expectation that his conversation might not be overheard by someone in the other room. The basis for the court's ruling—essentially plain view—clearly does not apply to the present situation of a closed Pringles can at the bottom of a grocery sack.

Churchill Downs separately contends that Jeffers had no reasonable expectation of privacy because the contents were "destined for public display in the infield." Whether or not an object is "destined for public display" is irrelevant to determining the existence of an expectation of privacy when the object is not currently in public view. As long as the object is concealed from public view in a place in which the person has a legitimate expectation of privacy, the Fourth Amendment applies. To hold otherwise, as Jeffers' counsel aptly remarks, would be to allow the police to search closets on the grounds that the clothes within are "destined for public display."

Churchill Downs' contention that Jeffers lost any expectation of privacy by giving the bag to his friend to carry is equally without merit. *Rawlings* v. *Kentucky,* 448 U.S. 98, 100 S.C. 2556, 65 L.Ed.2d 633 (1980), upon which Churchill Downs relies, held only that the defendant did not have a legitimate expectation of privacy in the purse of a woman whom he had just recently met. In the present case, Jeffers and his friends were merely carrying the bag and other items into the track. Gaining assistance to carry items over a short distance does not destroy an expectation of privacy. Were the opposite true, police-

men could station themselves at hotels and airports and search any piece of luggage which a guest or passenger allowed a porter carry.

Since Jeffers had a legitimate expectation of privacy in the contents of his grocery bag, that expectation is protected by the Fourth Amendment from unreasonable searches and seizures. A warrantless search is per se unreasonable, unless it falls under one of several carefully proscribed exceptions. *Katz,* 389 U.S. at 357. The burden in a civil action such as the case at bar falls upon the defendants to justify the warrantless procedure. *Wheaton* v. *Hagan,* 435 F.Supp. 1134 (M.D. N.C. 1977) (relying on *United States* v. *Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)).

Defendants argue first that the search was a valid consent search. It is clear from the evidence that Jeffers did not verbally consent to the search, nor did Officer Heavrin ask if she could search his parcels. Under certain circumstances, though, an individual may manifest a consent to search by his actions. *United States* v. *Davis, supra,* (agreeing that an airport search could be upheld on consent grounds). The *Davis* court stated:

> "We have held that, as a matter of constitutional law, a prospective passenger has a choice: he may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a 'consent,' granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment." *Id.* at 913.

This holding has been adopted by the Sixth Circuit in *United States* v. *Dalpiaz,* 494 F.2d 374 (6th Cir. 1974).

Several federal district courts have addressed gate searches conducted at rock concerts, and have found them unconstitutional. *Gaoini v. Folmar,* 460 F. Supp. 10 (M.D. Ala. 1978); *Stroeber* v. *Commission Veteran's Auditorium,* 453 F. Supp. 926 (S.D. Iowa 1977); *Wheaton v. Hagan,* 435 F. Supp. 1134 (M.D. N.C. 1977); *Collier v. Miller,* 414 F. Supp. 1357 (S.D. Tex 1976). However, notwithstanding plaintiff's urgings, these cases are not dispositive of the constitutionality of the searches at Churchill Downs.

Tony Jeffers knew from past experience that he would be searched if he sought admission to Churchill Downs. With this knowledge, Jeffers chose to attend the Derby and, consequently, to submit to the search. If he wanted, he could have chosen to avoid the search by not bringing any parcels or by not attending. In *Dalpiaz, supra,* the Sixth Circuit recognized that, as long as a person in such a situation has the right to turn around and leave without being searched, if that person then makes the decision to enter with the knowledge that he will be searched, he has consented to the search. 494 F. 2d at 376.

Jeffers argues that warning signs do not render a subsequent search valid on consent grounds, relying on *Ringe v. Romero,* 624 F. Supp. 417 (W.D. La. 1985). The *Ringe* opinion, however, focuses on the presence of signs as the sole basis for consent, citing to *Gaioni v. Folmar, supra,* (*Cf. Collier,* 414 F. Supp. at 1366, n. 10 (". . . the presence of conspicuous signs at the entrances [to the arena] might well justify a carefully limited search of persons who persist in carrying large containers into [the arena].").) In the present case, Jeffers had knowledge independent of the signs and announcements that his parcels would be searched. From this evidence, this Court concludes that by his choice to attend the Derby, Jeffers consciously and affirmatively consented to the search of his parcels at the gate.

In order to be valid, a consent to search must be obtained voluntarily and not through coercion. This is a determination to be made in consideration of the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1972). Several relevant factors to be considered are the number of officers present, *United States v. Hearn,* 496 F. 2d 236 (6th Cir. 1974); the environment in which the search took place, *Bustamonte, supra;* the subjective state of mind of the individual, *id.,* whether the individual was forewarned that a search would take place as a condition to entry, *Stroeber, supra, Collier, supra;* and whether the individual knew of his right to refuse consent. *Bustamonte, supra.*

Jeffers made the decision to attend the Kentucky Derby of his own free will. No one from either Churchill Downs or the JCPD forced or coerced him in this choice. When he arrived at the track and was searched, he was not in the midst of a threatening or coercive environment. Accompanied by three close friends, Jeffers proceeded to a designated area where his parcels were searched by two officers whom he agreed were polite and professional. Other officers were present at nearby turnstiles, but they were occupied with their own searches. The search occurred outdoors in daylight, in front of countless other members of the public. Moreover, as indicated above, Jeffers was forewarned by his own experience that his parcels would be searched if he sought entry to the track. He also knew that he had a right to refuse to submit to the search by not entering the track.

Two of the federal courts in the rock concert cases held that consent to search given in the belief that one will be denied access to the auditorium was "an inherent product of coercion." *Gaioni v. Folmar,* 460 F. 2d at 14; also *Collier v. Miller,* 414 F. 2d at 1366. In each instance, the court relied on the holding in *United States v. Chicago, Milwau-*

kee, St. Paul & Pacific Railroad Co., 282 U.S. 311, 328-29, 51 S.Ct. 159, 164, 75 L.Ed.2d 359 (1931), in which the Supreme Court stated, "The rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.* at 328-29, 51 S.Ct. at 164.

However, there is no legal right or privilege to attend Churchill Downs, a private facility, that is granted by the state. In *James v. Churchill Downs,* 620 S.W.2d 323 (Ky. App. 1981), the Kentucky Court of Appeals upheld the right of Churchill Downs to exclude whomever it desired from the track, so long as the exclusion was not based upon race, creed, color, or national origin. *Id.* at 324 (citing *Rodic v. Thistledown Racing Club, Inc.,* 615 F. 2d 736 (6th Cir. 1980). By comparison, the auditoriums involved in the rock concert cases were publicly owned, financed, and managed. Furthermore, even the *Stroeber* court acknowledged that "there is nothing constitutionally offensive" in banning certain items from an auditorium. 453 F. Supp at 933. Requiring consent to search as a condition to admission to Churchill Downs, therefore, is not inherently coercive.

Thus, based on the evidence at trial and the current case law, this Court concludes that Jeffers voluntarily consented to the search of his bag as a condition to his entry to Churchill Downs.

Even if this Court had not found that Jeffers consented, the search could be upheld as a lawful administrative search conducted in compliance with *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). A lawful administrative search must be conducted in furtherance of a legitimate government purpose or public necessity other than a search for criminal evidence. *Id.*

The Court in *Camara* held that a warrant was necessary for a building inspection, because the inspection was conducted at the discretion of the officer, and without a warrant an occupant had no way of verifying the inspector's authority to enter and search. *Id.* Warrants have traditionally not been required for administrative searches whose procedures satisfy these concerns. See, *e.g., United States v. Dalpiaz,* 494 F. 2d 374 (6th Cir. 1974) (airport search); *Downing v. Kunzig,* 454 F. 2d 1230 (6th Cir. 1972) (courthouse search); *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (immigration checkpoint on highway). In *Dalpiaz,* the Sixth Circuit noted a warrant was not required for an airport search since the search procedure was indiscriminately and uniformly applied without relying on the individual officer's discretion. 494 F. 2d at 376.

An administrative search must not only be justified by some public necessity but also must be reasonably likely to be effective in averting the potential danger. These factors of necessity and efficacy must be balanced against the degree and the nature of the instrusion of individual privacy that the search entails. *United States v. Skipwith,* 482 F. 2d 1271 (5th Cir. 1973).

Prior to the institution of the new search policy in 1981, there were a large number of cuts severe enough to require sutures which were caused by broken glass. In addition, there were a large number of fights, and bottles and other dangerous objects were often thrown through the crowd. The JCPD and Churchill Downs believed that drunkenness was a major contributing factor to the problem. The evidence clearly shows that a danger to the public existed which necessitated safety measures designed to keep out alcohol and potentially dangerous objects. This lies in stark contrast to *Collier,* where the court stated, "Obviously a proven history of disturbances, a factor completely absent

in the instant case, would do much to underscore the need for an adequate search procedure." 414 F. Supp. at 1366, n. 10. (Emphasis added). See also: *Gaioni,* 460 F. Supp. at 13-14.

The search policy appears to have been markedly successful in achieving its goal of reducing the number of injuries at the Derby. The sharp reduction in injuries is synonymous with the institution of the new policy in 1981. There is no evidence of any factor other than the search policy which might account for this dramatic about face.

Three elements of necessity and efficacy of the search are to be weighed against the intrusiveness of the search. Plaintiff relies upon *Collier* for the proposition that the threat from fights and thrown objects "pales in comparison to the dangers" addressed by courthouse and airport searches. 414 F. Supp. at 1362. See also: *Wheaton,* 435 F. Supp. at 1145.

The search procedure at Churchill Downs consisted of a brief inspection of the contents of all parcels. There was arguably a greater intrusion because the officers primarily used their hands to conduct the searches, as opposed to an x-ray machine and magnetometer as used at airports and courthouses. Any personal feeling of intrusion caused by the search is significantly lessened because everyone with a parcel was searched and thus no true stigma resulted therefrom.

The searches in the above-referenced rock concert cases were not conducted in a uniform manner. Instead, police officers merely grabbed or stopped patrons at random and searched them. Many people carrying parcels or wearing unusally baggy or layered clothing were not searched. Moreover, in each instance the search was conducted as a condition of entry to the auditorium only for rock concerts but not for other events. The courts rightfully found fault in such arbitrary and unjustified searches.

There was no such disparate treatment in the search procedure at Churchill Downs. Since every person who carried in a parcel was required to submit that parcel to inspection, there was indeed uniformity. This universal search procedure has been applied not only to all patrons entering from all gates but also on every day the track is open. There was no sudden grabbing of patrons by the police—in fact, even if patrons did not see the signs nor hear the tape, they could both see and hear the searches going on as they reached the head of the line. Finally, the searches were conducted without any significant delay.

This Court finds, therefore, that on balance, the searches at Churchill Downs are not an unduly intrusive invasion of privacy.

Jeffers finally challenges the legality of the search on the grounds that the search was in actuality a search for drugs. Jeffers argues that no reasonably prudent officer would have opened the Pringles can unless he or she was searching for drugs. This contention can be quickly dismissed. As Officer Heavrin testified at trial, the can could easily have contained weapons, alcohol, or glass objects—definitely a reasonable belief, especially in light of the extreme measure which some people take in order to sneak alcohol into Churchill Downs. Opening the Pringles' can can best be categorized as good, professional police work within the permissible scope of the search.

Contrary to the position taken by Jeffers, when Officer Heavrin gave the pill bottle to Sgt. Jones in order to have it examined by an experienced narcotics officer, there was no seizure of constitutional significance. Sgt. Jones returned very quickly, according to Jeffers himself, "in no more than a minute." Officer Heavrin was merely seeking the informed opinion of any other officer who was for all practical purposes on the scene. No significant or necessary distinction exists between her giving the pill bottle to

another officer to have it visually examined immediately, and requiring the narcotics officer to come over and examine it as it sat on top of the cooler.

Jeffers argues that even if the search was lawful, his arrest was not based upon probable cause. Probable cause for arrest exists where under the facts and circumstances known to the officer from "reasonably trustworthy information," a reasonably prudent officer would be warranted in the belief that a crime has been or is being committed. *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959).

Officer Heavrin had been told by a superior officer that the pills had been identified as valium, presumably by a narcotics officer. There was no reason for her to doubt that the information was "reasonably trustworthy." The pill bottle itself was suspicious, with only an unattached label inside the bottle rather than the customary exterior prescription label affixed with adhesive. Furthermore, Officer Heavrin's initial disbelief of Jeffers' answer that the pills were allergy medication was supported by what Sgt. Jones told her. Officer Heavrin had probable cause to arrest Tony Jeffers.

The decision of Officer Heavrin to arrest Jeffers was made at her own discretion, like any other arrest. Police officers daily use their individual discretion in making arrests, so it is not surprising to learn that some people were arrested for similar offenses on that day while others were not. This in no way affects the legitimacy of a lawful arrest made on probable cause.

Jefferson also claims his arrest was illegal because there is no Kentucky statute under which he could be arrested for having valium in his pill bottle. This contention is simply without merit. There are several statutes under which Jeffers could have been prosecuted. See KRS 217.175 (1, 2, 4, 10); 218A.140 (2, 4). (Removal of pre-

scription labeling; possession of controlled substance without proper label.)

Having upheld the search and arrest, this Court nevertheless feels compelled to address the treatment Jeffers received during his incarceration and prosecution. If this case is indicative of standard treatment which people receive after being arrested in Jefferson County, that standard cries out for change.

During the more than fourteen hours that Jeffers was in custody, the evidence is uncontradicted that he was confronted with several unduly rude police and corrections officers. Each time Jeffers asked a question, he was told to "shut up," and was threatened with being kept in jail for the weekend if he did not keep quiet. Undoubtedly, these officers were in the midst of a very hectic day and were confronted with instances of drunk and rowdy arrestees. However, it is of vital importance that law enforcement officers do not lose sight of the fact that they were dealing with individuals who are not all alike and some may have a legitimate question or grievance to air.

The prosecution of Tony Jeffers was itself poorly and negligently pursued. Officer Heavrin was subpoenaed well in advance of each trial date. Before the first trial date, Officer Heavrin called once to see if the lab report on the pills had been returned. Although the report was not in when she called, it had been returned by May 23 — nine days before trial — and showed that the pills were only allergy pills. Heavrin neither checked on the report a second time nor called the prosecutor or court clerk in advance to inform them that the lab report had not been completed. As a direct result, Jeffers was required to drive four hours from his home to Louisville for no good reason. Even if Heavrin could be excused from not checking on the lab report's progress a second time, there can

be no excuse for failing to contact someone associated with the prosecution before the trial date.

Moreover, she did know at least a week before the June 22 trial date that there was no criminal evidence against Jeffers. Once again, she did not contact anyone upon learning this information. Jeffers, for a second time, needlessly had to make the long drive down to Louisville.

Even if Tony Jeffers had lived in Louisville, Officer Heavrin's conduct would leave much to be desired. He would still have been living under the ominous shadow of an upcoming trial, and would have been forced to miss work. The fact that Tony Jeffers lived four hours from Louisville only worsened the inevitable consequences of Officer Heavrin's action (or inactions). Our society expects that its law enforcement officers should not cause innocent people to be prosecuted unnecessarily. Arrest and prosecution for a criminal offense can carry a heavy stigma. When an officer discovers or should have discovered evidence that exonerates an individual who has been arrested, that officer has an affirmative duty to make the necessary contacts so that the prosecution will cease immediately. However many arrests or cases an officer is involved in, this duty cannot and must not be forsaken, for each of those arrest slips represent a person — a person who deserves to be free from prosecution if there is no incriminating evidence against him.

Thus, although Jeffers' complaint sufficiently makes a separate claim for damages as the result of negligent prosecution, damages were not established during trial with the specificity required in order for this Court to render an award. For that reason and that reason only, an award of damages will not be made to the plaintiff for his claim of negligent prosecution.

An Order reflecting this Court's ruling is entered simultaneously herewith.

ORDER

The Court having entered simultaneously herewith its Findings of Fact and Conclusions of Law and being otherwise sufficiently advised;

It Is Hereby Ordered that judgment be and hereby is granted in favor of the defendants.

This is a final and appealable Order there being no just cause for delay.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-84-0211-L(M)

TONY JEFFERS - - - - - - - - *Plaintiff*

v.

DEBBIE HEAVRIN, Et Al. - - - - *Defendants*

ORDER—Entered July 6, 1989

This matter is before the Court on the motion of the defendants Heavrin and Jefferson County, Kentucky, to amend the Court's Findings of Fact and Conclusions of Law.

The defendant correctly states that the reference to "police" on page 22 of the Findings and Fact and Conclusions of Law was an inadvertant slip of the pen and it shall be deleted. However, with reference to the language of the Court in the remainder of the Opinion, the Opinion will stand as is for two reasons. First, the evidence reflects that the officer knew that the medicine was allergy medicine before the plaintiff made two trips to Louisville. Second, the plaintiff was neither on drugs nor intoxicated but was not treated in the most courteous manner. In this instance, I believe the Corrections Department could have and should have done better in processing the plaintiff, realizing full well that Derby Day is far from being a normal day for the Department. Nevertheless, all one has to do is place himself in the plaintiff's position as one

who was completely innocent of the charges against him to realize that less than courteous treatment by Corrections would certainly exacerbate the frustration the plaintiff had to be experiencing. Those handling prisoners have a tough, thankless job but they should be as professional and courteous as circumstances will permit. The Court would be the first to say that if a particular prisoner is unruly or discourteous himself, then the appropriate authorities must deal quickly and severely if need be with such an individual. However, in this case the Court does not recall any testamony whatsoever that the plaintiff ever acted in a recalcitrant or discourteous fashion.

IT IS HEREBY ORDERED that the motion to amend be and hereby is GRANTED as to the word "police" on page 22. The word "police" shall be deleted from the Opinion.

IT IS FURTHER ORDERED that as to all other aspects of the Opinion the motion to amend be and hereby is DENIED.

Dated this 7th day of July, 1989.

(s) Ronald E. Meredith
Ronald E. Meredith
Judge, U.S. District Court

cc: Counsel of Records

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0211-L(M)

TONY JEFFERS - - - - - - - - *Plaintiff*

v.

DEBBIE HEAVRIN, Et Al. - - - - - *Defendants*

NOTICE OF APPEAL

The plaintiff, Tony Jeffers, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered on July 7, 1989.

Respectfully submitted,

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Attorneys for Plaintiff

SUPREME COURT OF THE UNITED STATES

No. A-232

DEBBIE HEAVRIN - - - - - - - *Petitioner*

v.

TONY JEFFERS, Et Al

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 15, 1991.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 26th
day of September, 1991

totally—

The Court: Well, I will sustain the objection. Do you remember, Officer, one way or the other asking?

The Witness: No, Your Honor, I don't.

The Court: All right.

By Mr. Post:

Q. Officer Heavrin, what was it that Sergeant Jones told you when he came back?

A. He told me that the pills were Valium and I could charge Mr. Jeffers if I wanted to.

Q. About how long was Sergeant Jones gone?

A. I don't remember.

Q. If you can remember, I would like to get the exact words Sergeant Jones used, if you are able to. Are you able to?

A. No, sir, I don't remember his exact words.

Q. Would it be correct if I were to say you do not know whether Jones said the pills were Valium or might be Valium, is that fair?

A. I don't remember.

Q. That is you don't remember whether he said they were or might be, correct?

A. Yes, sir.

Q. And your at least state of mind on that day would have been such that even if he said they might be Valium, you still were going to arrest Mr. Jeffers, weren't you?

He came back and he told her he thinks they are Valium, can either charge him or you can throw them away.

Q. Now, when you said he thinks they are Valium, either charge him or throw them away, did you mean to be quoting what the officer was saying?

A. Yes, that's exactly what he says.

Q. Pardon?

A. That's exactly what he said.

Q. So the officer said, "He thinks they are Valium, you can either charge him or throw them away", is that right?

A. Yes. In interpreted it that the narcotics agent had told him that.

Q. All right. Did Officer Heavrin at that time ask this officer, well, how sure he is, or what do you mean by he thinks they are Valium?

A. No, sir. That was the only conversation between the two of them. She did not say a word.

Q. What happened next then once Officer Heavrin got this, these words he thinks they are Valium, charge him or throw them away, what happened next?

A. She stood there for just a few seconds like she was deciding what to do and she grabbed me by one arm and he grabbed me by the other and they took me off towards the left to the holding center.

Q. And now, with regard to this officer—well, first you

(2)

No. 91-825

FILED

DEC 23 1991

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEBBIE HEAVRIN - - - - - Petitioner

versus

TONY JEFFERS - - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this case is whether the circuit court correctly held that a police officer lacks probable cause to arrest a citizen when, ignoring every opportunity to determine from the citizen, the citizen's doctor, an available pharmacological encyclopedia, or trained and physically present narcotics officers, whether the citizen's allergy medication is what it purports to be, she arrests the citizen based on the statement of a single non-narcotics officer's statement that the medication "might be" Valium?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEBBIE HEAVRIN - - - - - - - *Petitioner*

v.

TONY JEFFERS - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, Tony Jeffers, respectfully opposes issuance of a writ of certiorari for the reasons contained in this brief.

COUNTERSTATEMENT OF THE CASE

The petitioner's (Heavrin) statement of procedural history is essentially correct and will not be repeated here. The respondent (Jeffers) writes only to highlight factors weighing against issuance of the writ.

Jeffers attended the 1983 Kentucky Derby with numerous personal possessions, including his prescription allergy pills. As part of a comprehensive search of Jeffers' possessions, Heavrin found the plastic pill vial and inquired about it. Jeffers replied that it contained his prescription allergy medicine. Although the Indiana prescription was in Jeffers' name and contained the name and telephone number of an Indiana physician, Heavrin "thought [Jeffers] was probably lying," because it was a "common answer" to police inquiries about pills.

Heavrin was inexperienced in the identificatin of drugs. Four narcotics officers were at Churchill Downs on Derby Day for the express purpose of identifying drugs. Heavrin elected not to seek the assistance of any of the four, even though the chain of custody shows that she conveyed Jeffers' pills directly to a narcotics officer. Jefferson County Police also had copies of the Physician's Desk Reference (PDR)[1] at the track to assist in identification; Heavrin elected not to refer to it. Heavrin also ignored Jeffers' repeated request that Heavrin call Jeffers' doctor or allow him to do so.

Rather, Heavrin arrested Jeffers, relying exclusively on the comment of another officer (not a narcotics officer) that the pills "might be Valium" and that Heavrin could either arrest Jeffers or throw the pills away.[2] Had she bothered to consult any of the narcotics officers in attendance, each would have told her—as each testified at trial—that he could not identify Jeffers' pills as Valium and that, indeed, the markings on the pills were consistent with those of a generic allergy medication.

Jeffers spent fifteen hours in the Jefferson County Jail and made two subsequent trips to Lounsville for trial, after which all criminal charges were dropped because the pills were indeed Jeffers' allergy medication.

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[1]PDR is a familiar encyclopedia of prescription medicine. It shows pictures of hundreds of pharmacological pills, describes their identifying marks and details their content and use. Jeffers' pills matched the verbal description and picture in PDR for PBZ, a generic allergy pill.

[2]Completely aside from the availability of ample expert advice, Heavrin should have been suspect of this non-expert advice, since police have no authority whatsoever to "throw away" a citizen's property.

Based on the district court's findings of fact after a non-jury trial, the Sixth Circuit held that, under the totality of circumstances, Heavrin lacked probable cause and that her arrest of Jeffers deprived him of fourth amendment rights.

REASONS FOR DENYING THE WRIT

I. The Case Is Entirely Fact-Bound and Does Not Conflict With Any Decisions of This Court or Any Court of Appeals.

Contrary to Heavrin's assertion, *see* Petition for Writ of Certiorari (Petition) at 10-17, this case presents no conflict of cases; neither does it present a novel question of law. Rather, the case presents a simple application of existing authority to the unique facts here.

No litigant has suggested and no court has concluded that the law is less than clear here. The majority of the Sixth Circuit panel held that *Illinois* v. *Gates*, 462 U.S. 213 (1983), stands for the proposition that any determination of probable cause for an arrest is subject to a "totality of circumstances" test. The dissenting judge agreed with this proposition. The panel members disagreed, as Heavrin and Jeffers disagree, solely on the *application* of this legal standard to the facts here. The majority of the panel simply held that *application* of the facts found by the district court compelled the legal conclusion that the totality of circumstances did not give Heavrin probable cause to arrest Jeffers.

Heavrin does not here dispute *Illinois* v. *Gates*, nor does she suggest that it does not govern this case. She simply argues that application of the standard to these facts yields

a contrary result.[3] The result, whether favorable to Heavrin or Jeffers, is narrow and expressly tied to this factual record. It thus has no applicability beyond this case and does not warrant this Court's review.

II. Issuance of the Writ Would Be Premature.

Heavrin also argues that she is entitled to qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), and its progeny. *See* Petition at 14-17. Neither the district nor circuit courts reached this issue and this Court should not reach it prematurely.

Because the district court upheld the constitutionality of the arrest on the merits, it did not reach Heavrin's qualified immunity defense. The Sixth Circuit reversed this legal conclusion and remanded the case to the district court for further proceedings, including a consideration of Heavrin's entitlement to qualified immunity. This Court will thus have ample opportunity to consider granting a writ of certiorari if, upon remand, the district court denies Heavrin's claim of qualified immunity and the Sixth Circuit affirms that denial. Unless then, the issue is premature.

III. Jeffers' Notice of Appeal Was Proper.

Relying exclusively on *Torres* v. *Oakland Scavenger Company,* 487 U.S. 312 (1988), Heavrin persists in her argument that the appellate court lacked jurisdiction because Jeffers' notice of appeal cited to the date the district court's memorandum opinion and judgment became final —that is, when the district court denied Heavrin's motion

[3]Heavrin also suggests that the Sixth Circuit failed to adhere to the district court's factual findings. *See* Petition at 11-13. To the contrary, the Sixth Circuit merely applied the existing legal

(Continued on next page.)

to alter or amend under Fed.R.Civ.P. 59(e)—rather than the date of the original memorandum opinion and order. *See* Petition at 5-10.

This misreads *Torres*, which held that a court lacks jurisdiction over an appeal on behalf of a party not named in the notice of appeal. Here, the district court entered only one final judgment, which only became appealable after the district court ruled on Heavrin's Rule 59 motion. As the Sixth Circuit concluded in denying Heavrin's motion to dismiss the appeal, "[m]isindentification of the ruling being appealed from does not destroy appellate jurisdiction as long as the appellant's intent is apparent and the appellee suffers no prejudice."[4] Those conditions are easily met here.

Heavrin's argument is thus semantic, not jurisdictional, and does not warrant this Court's review.

(Continued from preceding page.)

standard to the facts as found by the district court. Indeed, only Judge Boggs, in his partial dissent, expressed doubt about the district court's factual findings and would have remanded this issue for further findings.

[4]The Court cited for this proposition *United States* v. *Willis*, 804 F.2d 961, 963 (6th Cir. 1986); *Taylor* v. *United States*, 848 F.2d 715, 717 (6th Cir. 1988); and *McLaurin* v. *Fischer*, 768 F.2d 98, 101 (6th Cir. 1985).

CONCLUSION

For these reasons, the petition presents a narrow issue of applying undisputed law to the unique facts of this case. The Sixth Circuit's application of the clear law to these facts is of limited applicability beyond this case. In addition, Heavrin's qualified immunity arguments are premature and her jurisdictional argument is simply wrong. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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